

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

ROBERT BONHAM,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

) Case No. DISM-02-0019

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) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

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I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair; GERALD L. MORGEN, Vice Chair; and BUSSE NUTLEY, Member. The hearing was held at the office of the Personnel Appeals Board, in Olympia, Washington, on July 8, 2003 and July 9, 2003.

1.2 **Appearances.** Appellant Robert Bonham was present and represented himself *pro se*. Mickey Newberry, Assistant Attorney General, represented Respondent Department of Labor and Industries.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, inefficiency, malfeasance, gross misconduct, and willful violation of published employing agency or Department of Personnel rules or regulations. Respondent alleged that Appellant, on two occasions, submitted miscellaneous leave requests for time away from the office to take promotional state examination tests although he did not take either test.

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2 1.4 **Citations Discussed.** WAC 358-30-170 Baker v. Dep't of Corrections, PAB No. D82-084
3 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Anane v.
4 Human Rights Commission, PAB No. D94-022 (1995), *appeal dismissed*, 95-2-04019-2 (Thurston
5 Co. Super. Ct. Jan. 10, 1997); Parramore v Dep't of Social & Health Services, PAB No. D94-135
6 (1995); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Harper v. WSU, PAB No.
7 RULE-00-0040 (2002); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994);
8 Aquino v. University of Washington, PAB No. D93-163 (1995); Holladay v. Dep't of Veterans
9 Affairs, PAB No. D91-084 (1992).

11 II. FINDINGS OF FACT

12 2.1 Appellant was an Accountant 2/Fiscal Analyst 2 and permanent employee for Respondent
13 Department of Labor and Industries. Appellant and Respondent are subject to Chapters 41.06 and
14 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a
15 timely appeal with the Personnel Appeals Board on February 28, 2002.

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17 2.2 By letter dated January 31, 2002, Steve Young, Assistant Director for Administrative
18 Services, informed Appellant of his dismissal effective at the end of his work shift on February 15,
19 2002. Mr. Young charged Appellant with neglect of duty, inefficiency, malfeasance, gross
20 misconduct, and willful violation of published employing agency or Department of Personnel rules
21 or regulations. Mr. Young alleged that Appellant, on two occasions, submitted miscellaneous leave
22 requests for time away from the office to take promotional state examination tests. However,
23 Appellant did not take either test and therefore received a total of eight hours pay for miscellaneous
24 leave to which he was not entitled.

2.3 Appellant has been the subject of prior formal disciplinary action and has a history of prior counseling and corrective action. Appellant's personnel file includes the following:

- On October 15, 1999, Appellant was suspended for 15 days without pay for e-mail violations, private use of state resources for personal gain, and violation of the department's Internet Policy.
- On February 23, 1993, Appellant was reprimanded for failing to keep his work up-to-date and using the phone and computer to conduct personal business on two occasions. Additionally, Appellant was reprimanded and reminded of the department policy for taking job examinations, job interviews, and sick leave. Appellant was frequently away from the office for those purposes without adequate leave documentation.
- On November 18, 1992, Appellant was reprimanded for non-adherence to scheduled work hours and absences from his desk for long periods of time without notifying his supervisor.
- On October 1, 1991, Appellant was reprimanded for inappropriate and insubordinate behavior, including verbal and behavioral abuse toward his supervisor.
- On September 18, 1991, Appellant was counseled for non-adherence to scheduled work hours.
- On August 14, 1991, Appellant was reprimanded for inaccurate work after frequent counseling that resulted in no improvement.
- On July 31, 1991, Appellant was reprimanded for inappropriate and insubordinate behavior, including verbal abuse directed toward his supervisor.
- On June 27, 1991, Appellant was counseled for non-adherence to work schedule and absences from his desk for long periods of time without notifying his supervisor.
- On July 30, 1990, Appellant was reprimanded for not completing his work in a timely manner, and verbally and physically intimidating his supervisor.

2.4 The Department of Labor and Industries Administrative Policy 3.0 addresses the use of persons, money, or property for private gain and includes ethical standards. The policy states, in part, that: "Agency employees have a responsibility to adhere to the ethical standards contained in this and other administrative policies, making decisions based on public interest rather than on

1 personal gain.” The policy further states that employees are prohibited from “any interest or
2 business which is in conflict with state duties,” and “using state resources for personal benefit.”

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4 2.5 The Department of Labor and Industries Administrative Policy 3.30 addresses the use of
5 state resources. The policy states, in part, that: “State funds ... and other resources are to be for
6 state business only. Misuse of work time or other state resources is abuse of public trust and is
7 subject to corrective or disciplinary action as appropriate.”

8
9 2.6 The Department of Labor and Industries Administrative Policy 3.37 addresses theft of state
10 resources and states, in part, that: “Employee theft, fraud, or embezzlement shall result in
11 disciplinary action. (1) An employee who steals cash, supplies, or equipment from the department
12 or its customers shall be subject to formal and documented disciplinary action, up to and including
13 dismissal.”

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15 2.7 The Department of Labor and Industries Administrative Policy 3.50 addresses leave. The
16 policy states, in part, that: “Supervisors may approve and require documentation for an employee’s
17 request for miscellaneous leave ... to take an examination for a state position.”

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19 2.8 On August 29, 2001, Appellant was out of the office for four hours to take a 9:00 a.m.
20 Revenue Auditor 2 employment test. On August 31, 2001, Appellant submitted a leave request
21 form to his supervisor, John Rhodes, for four hours of miscellaneous leave. Appellant also
22 provided supporting documentation by giving Mr. Rhodes a copy of the Revenue Auditor 2 exam
23 notification.

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25 2.9 On September 1, 2001, Appellant transferred to another unit and began working under the
26 supervision of Larry Rzany, Accounting Manager. Appellant also told Mr. Rzany that he would

1 need to be out of the office occasionally to take state tests and go to interviews. Appellant asked
2 Mr. Rzany if he followed the “informal” or “formal” method for that type of leave. Mr. Rzany
3 responded that he followed the “formal” method and Appellant would be expected to fill out
4 miscellaneous leave forms and turn in documentation to show proof that he had taken exams.

5
6 2.10 On September 13, 2001, Appellant notified Mr. Rzany that he was scheduled to take a
7 Research Analyst 1 employment test the following morning on September 14, 2001. Mr. Rzany
8 asked Appellant to complete a miscellaneous leave request form and submit the appropriate test
9 documentation.

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11 2.11 On September 17, 2001, Mr. Rzany had not received the requested paperwork from
12 Appellant, so he sent an e-mail reminder to Appellant. Appellant provided Mr. Rzany with a
13 miscellaneous leave request for four hours and a copy of the Research Analyst 1 exam notification.

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15 2.12 When Mr. Rzany looked at the Research Analyst 1 exam notification, he noticed that the
16 date was askew and it did not look like an “authentic” document. The document appeared to Mr.
17 Rzany to be altered. Mr. Rzany decided to investigate whether Appellant actually took the test as
18 he claimed.

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20 2.13 Mr. Rzany requested that Deborah Yantis of Human Resources contact the Department of
21 Personnel. At Ms. Yantis’ request, Teresa Dillon of the Department of Personnel checked the
22 testing records and discovered that Appellant did not take the Research Analyst 1 test on September
23 14, 2001. In fact, that particular test was not scheduled to be given on September 14, 2001. Ms.
24 Dillon reported that Appellant took the Research Analyst 1 test back on June 1, 2001 and failed it.
25 After checking further, Ms. Dillon discovered that Appellant was actually scheduled to take an
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1 Administrative Assistant 3 employment exam on September 14, 2001; however, he did not arrive at
2 the testing site to take the test that day.

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4 2.14 After discovering that Appellant had been dishonest about the September 14, 2001 test, the
5 agency asked Ms. Dillon to check the records regarding Appellant's claim that he took a Revenue
6 Auditor 2 employment test on August 29, 2001. Ms. Dillon reported that Appellant was scheduled
7 to take the August 29, 2001 Revenue Auditor 2 test; however, he did not arrive that day to complete
8 the test.

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10 2.15 On October 1, 2001, Mr. Rzany sent an e-mail to Mr. Young requesting that formal
11 disciplinary action, up to and including dismissal, be initiated against Appellant. Mr. Rzany
12 included the following statements in his request to Mr. Young:

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14 This request is based on the conclusion that the abuse of miscellaneous leave ... is fraud
15 (theft of hours), which may have criminal or civil penalties/ramifications. These actions
may also violate State Ethics Laws and Regulations.

16 These conclusions ... regarding [Appellant's] actions and the request for disciplinary action
17 up to and including dismissal are based on the fact that [Appellant's] Accountant 2 position
18 is one that represents a guardian of the public trust. This Accountant 2 position is charged
19 with the responsibility of protecting the public's assets from fraud and misuse. In addition,
20 this Accountant 2 position has the capability to misdirect or misappropriate the assets under
the position's care without immediate detection. It is imperative that this position is above
reproach, both in fact and appearance, in order to ensure the integrity of the agency in the
eyes of the public.

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22 2.16 On November 2, 2001, a letter was delivered to Appellant explaining the allegations. On
23 December 28, 2001, Appellant responded in writing. Appellant stated that:

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- He was sick the morning of August 29, 2001; therefore, he did not appear for the exam.
 - He submitted a sick leave request for August 29, 2001, but submitted the wrong number of hours.
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- At the conclusion of taking the test on September 14, 2001, he “surprisingly noticed that he had taken the wrong test.” After waiting in the long line of people who were turning their tests in, he “unwisely decided to walk ahead of the line and set his test booklet on the table” and left.
- When he returned to work on September 14, 2001, he went to Mr. Rzany’s office to explain the situation, but Mr. Rzany was out for the day.
- When Mr. Rzany sent him a reminder to turn in his leave slip and test documentation, he was so focused on his work that he did not take the time to explain what happened to Mr. Rzany.

2.17 After reviewing Appellant’s written response that he was sick the morning of August 29, 2001, Mr. Young was not convinced because he examined Appellant’s leave requests and discovered that Appellant had submitted his request for four hours of miscellaneous leave prior to submitting the sick leave request.

2.18 After reviewing Appellant’s explanation that he mistakenly took the wrong test and did not discover it was the wrong test until after he had completed it, Mr. Young checked with the Department of Personnel. After the Department of Personnel explained their testing process in detail, Mr. Young concluded that Appellant’s explanation was not believable. A simultaneous failure of at least five separate steps and checks in the Department of Personnel’s testing process would have had to occur in order for Appellant’s explanation to be true and accurate.

2.19 Mr. Young concluded that Appellant failed to provide any mitigating circumstances for his actions. Mr. Young determined that Appellant’s behavior was unacceptable and that he had neglected his duty, engaged in inefficiency, malfeasance, gross misconduct, and willfully violated published agency policies.

2.20 In determining the level of discipline, Mr. Young reviewed the relevant agency policies and Merit System Rules. Mr. Young also reviewed Appellant’s personnel file including the suspension, letters of reprimand, and oral counselings. Mr. Young was concerned by Appellant’s ongoing

1 pattern of deceit, denial, misuse of state resources, and deflection of personal responsibility even
2 when presented with the facts. Mr. Young concluded that Appellant was responding to the current
3 allegations in the same manner. Even though Appellant had been given many opportunities to
4 correct his behavior, his behavior had not changed.

5
6 2.21 When Mr. Young considered that Appellant lied to his supervisor, falsified the Research
7 Analyst 1 examination document as part of his deception, and then lied once more in his written
8 explanation, he concluded that he was not able to trust Appellant to work as an accountant within
9 the agency and be responsible for billions of dollars in trust funds. Accountants must have integrity
10 and be above reproach; however, Mr. Young felt he could not trust that Appellant would not repeat
11 his dishonest behavior. Although it was a difficult decision considering Appellant's length of time
12 with the agency, Mr. Young concluded that termination was the only appropriate sanction.

13
14 2.22 Sometime after receiving the January 31, 2002 dismissal letter, Appellant contacted Mr.
15 Young by telephone. Appellant admitted that he had lied and falsified the examination document.
16 Appellant asked to be forgiven and requested to be reinstated into his accountant position.
17 However, after considering the length of time it took Appellant to finally tell the truth, Mr. Young
18 did not change his mind about terminating Appellant.

21 **III. ARGUMENTS OF THE PARTIES**

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23 3.1 Respondent argued that Appellant knew he was not entitled to miscellaneous leave unless he
24 actually took a state examination. Respondent asserted that Appellant took leave to which he was
25 not entitled, lied to two supervisors, and falsified another agency's document. Respondent
26 contended that after being confronted with the fact that he had fraudulently taken eight hours of

1 miscellaneous leave under false pretences, Appellant failed to take responsibility for his lies and
2 deceit. Respondent argued that Appellant continued to lie by making up an unbelievable story
3 about taking the wrong test in an attempt to cover up his dishonest behavior. Respondent asserted
4 that Appellant had a history that shows a pattern of deceit and refusal to accept responsibility for his
5 actions. Respondent contended that a Fiscal Analyst such as Appellant who lacks integrity and is
6 unable to be trusted could not remain employed with the agency. Respondent argued that Appellant
7 had been given opportunities in the past to correct his behavior; however, his behavior had not
8 changed. Respondent asserted that termination was the appropriate sanction in this case and asks
9 the Board to uphold that decision.

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11 3.2 Appellant argued that the disciplinary action of dismissal was too harsh in his case.
12 Appellant asserted that he admitted to the agency that he lied, that his behavior was wrong, and he
13 asked for forgiveness to no avail. Appellant contended that in the first incident, he called in sick
14 and Mr. Rhodes instructed him to use administrative leave for the morning and sick leave for the
15 afternoon. Appellant argued that in the second incident, he was not thinking clearly because he was
16 under a great deal of stress and duress due to his fear of Mr. Rzany because Mr. Rzany believed he
17 was a whistle blower. Appellant contended that there were other times when he took state tests and
18 followed the rules, so he has not been dishonest every time. Appellant argued that he regrets what
19 he did, he has learned his lesson, and he will never make similar mistakes again. Appellant asserted
20 that he did not realize how serious the situation was until he received his dismissal letter. Appellant
21 asks the Board to reverse his dismissal and reinstate him to his former position.

22 23 **IV. CONCLUSIONS OF LAW**

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25 4.1 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
26 the charges upon which the action was initiated by proving by a preponderance of the credible

1 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
2 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
3 Corrections, PAB No. D82-084 (1983).

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5 4.2 Neglect of duty is established when it is shown that an employee has a duty to his or her
6 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
7 of Social & Health Services, PAB No. D86-119 (1987).

8
9 4.3 Inefficiency is the utilization of time and resources in an unproductive manner, the
10 ineffective use of time and resources, the wasteful use of time, energy, or materials, or the lack of
11 effective operations as measured by a comparison of production with use of resources, using some
12 objective criteria. Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal*
13 *dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997).

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15 4.4 Respondent has met its burden of proving that Appellant neglected his duty and engaged in
16 inefficiency when he failed to follow agency policies, use his work time in an efficient, ethical, and
17 appropriate manner, be truthful with his supervisor, and use miscellaneous leave only when he was
18 entitled to it according to agency policy and Merit System Rules.

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21 4.5 Malfeasance is the commission of an unlawful act, the act of doing what one ought not to
22 do, or the performance of an act that ought not to be done, that affects, interrupts, or interferes with
23 the performance of official duty. Parramore v Dep't of Social & Health Services, PAB No. D94-
24 135 (1995).

1 4.6 Respondent has met its burden of proving that Appellant's behavior constituted malfeasance
2 when he fraudulently and inappropriately used leave time that he was not entitled to. Further,
3 Appellant aggravated the situation by falsifying the Department of Personnel's examination
4 document and used it as "proof" that he was using miscellaneous leave appropriately.

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6 4.7 Gross misconduct is flagrant misbehavior that adversely affects the agency's ability to carry
7 out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989). Flagrant
8 misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's
9 interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

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11 4.8 Respondent has met its burden of proving that Appellant engaged in gross misconduct when
12 his fraudulent and dishonest behavior caused the agency to pay him for eight hours of
13 miscellaneous leave to which he was not entitled.

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15 4.9 Willful violation of published employing agency or institution or Personnel Resources
16 Board rules or regulations is established by facts showing the existence and publication of the rules
17 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
18 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

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21 4.10 Respondent has met its burden of proving that Appellant willfully violated Department of
22 Labor and Industries Administrative Policy 3.0, Administrative Policy 3.30, Administrative Policy
23 3.37, and Administrative Policy 3.50.

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25 4.11 Although it is not appropriate to initiate discipline based on prior formal and informal
26 disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding

1 the level of the sanction which should be imposed here. Aquino v. University of Washington,
2 PAB No. D93-163 (1995).

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4 4.12 In determining whether a sanction imposed is appropriate, consideration must be given to
5 the facts and circumstances, including the seriousness and circumstances of the offenses. The
6 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to
7 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the
8 program. An action does not necessarily fail if one cause is not sustained unless the entire action
9 depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

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20 4.13 In light of Appellant's egregious behavior and history of disciplinary and corrective action,
21 Respondent has established that the disciplinary sanction of dismissal was not too severe and was
22 appropriate under the circumstances presented here. Therefore, the appeal should be denied.

23 24 **V. ORDER**

25 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Robert Bonham is denied.

1 DATED this _____ day of _____, 2003.

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WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Gerald L. Morgen, Vice Chair

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Busse Nutley, Member

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